United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

527

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,059

UNITED STATES OF AMERICA, Appellee

v.

JERRY A. HINES, Appellant

Appeal From a Judgment of the United States District Court for the District of Columbia

Samuel Barker

4983 Auburn Avenue
Bethesda, Maryland 20014

Attorney for Appellant
(Appointed by this Court)

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ISSUES PRESENTED FOR REVIEW

Did the District Court err in permitting police officers to testify as to statements made by appellant under the circumstances related hereafter.

This Case Has Not Previously Been Before This Court

STATEMENT OF THE CASE

Appellant Jerry Hines was indicted on August 14, 1967, on a charge of assault with intent to commit robbery on April 19, 1967, in violation of D.C. Code Sect. 22-501. He was arrested at 5:00 p.m. and kept in the custody of the police until the following morning when he was taken to Court.

Hines was tried before a jury in the District Court on January 30 - February 6, 1968, and was found guilty as charged. The District Court on April 5, 1968, sentenced Hines to a term of one to four years imprisonment.

A. Preliminary Hearing Out Of Presence Of The Jury

The United States Attorney, at the outset of the trial, advised the Court that the Government was relying upon statements made by the defendant to establish the identity of the perpetrators of the offense (Tr. 4). A hearing was thereupon held out of the presence of the jury.

He outlined the case he would present to the effect that on the 20th or early 19th of April, a man with two companions boarded a truck which was parked at the Fifth Street Market and was being slept in by a man named Puckett and a man named Phillips. Phillips removed a pistol and shot at the three men. The Government, he contended, would show that Hines was hit by that shot and went to the Washington Hospital Center (Tr. 5-6).

The United States Attorney advised the Court that three police officers had received statements from the defendant which the Government intended to use against him in the case and that "if your Honor decides not to accept the statements into evidence, the Government might well be placed in the position

where we would have to reconsider our whole position in light of the unusual character of the evidence" (Tr. 16).

1. The Statement Made To Officer Antonio F. Ruiz

This officer testified that he was a detective assigned to the Homicide Squad. That in response to a call from the Washington Hospital Center he arrived at the emergency room at 12:20 a.m. on April 20, 1967, in regard to a gunshot case (Tr. 21).

Ruiz testified that he found Hines "lying on his back" on a treatment table in the emergency room where there were some three doctors attending him (Tr. 22). Ruiz observed the doctor probing the wound in the left ear--there was a puncture in the ear hole which was bleeding. "I was there alongside the treatment table next to the hospital personnel" (Tr. 23).

"He appeared to be in some pain and the doctors were probing the ear and he was attempting to move his head from side to side" (Tr. 24).

Ruiz stated that while the doctors were working on the wound he wedged his way in and told Hines he was a police officer--that Hines made no reply --and appeared to be in pain, but he continued his questioning as to how he had received the injury and where. "He was not certain how he received the injury--mentioned Maryland" (Tr. 24). Ruiz then left the room and told his partner to call Maryland Police. When he returned he continued to question Hines. In response to a question from the Court as to what was going on at that time, Ruiz replied that Hines was still on the table being treated by the doctors (Tr. 25).

After continued interrogatories by Ruiz, Hines, according to Ruiz,

stated that he had received his injuries around a red stake-body truck which was parked around Fourth or Fifth Street, N. W.; that while he was standing by the truck a man began shooting at him (Tr. 26).

Ruiz estimated the interrogation lasted no more than 15 - 20 minutes (Tr. 26). He characterized the general situation as follows:

During the questioning, the defendant appeared to be in pain; he was squinting--his eyes were shut--he was attempting to squirm on the table, especially when probing was going on inside his ear. His voice was very low and he was not talking in sentences--just like picking words one at a time--"I don't know"--"somewhere in Maryland"--"somewhere on Fourth or Fifth Street".

"Hines was on the treatment table during the entire time."

"All his answers were very hesitant and at first I thought he was incoherent, you know, as a result of the injury."

"I thought he was incoherent because he was in pain, etc."

It was obvious Hines was in pain--groaning and moaning--lots of blood (Tr. 29 - 41).

With reference to the interrogation by Detective Ruiz, the defendant Hines testified:

"After I got to the hospital for a while, about four days later, after they operated on me, I asked my girl friend what was wrong and she said--'you got shot'. My head was aching then" (Tr. 247).

He also stated that as to the emergency room--"all I remember is laying there and saying, 'Please somebody do something for me'." As far as

a detective, I don't know of any detective (Tr. 248).

The Court thereupon stated: "I think the testimony of Officer Ruiz is admissable * * *" (Tr. 259).

2. The Statement Made To Officer Peter Joseph Zarcone

This officer testified he was attached to the Criminal Investigation Unit and arrived at the Washington Hospital Center at about 5:00 a.m. on April 20th (Tr. 193).

Zarcone stated that he had brought Phillips (the complaining witness) to the hospital to identify Hines as the person who had attempted to rob him. They found Hines in bed, his head bandaged and he "seemed to be in pain--he was grimacing" (Tr. 195).

"I told him I am Detective Zarcone and I am going to ask what happened. He told me he was shot in the lot off of North Capitol Street. * * * he was with two friends and they were looking at a red truck and a white man sat up and shot him" (Tr. 197 - 8).

Zarcone also stated that before he came to the hospital he knew an attempted robbery had been committed and that a lookout had been sent to all hospitals to be on the lookout for anyone suffering from a gunshot wound (Tr. 200).

In response to a question from the Court, Zarcone replied that he did not tell Hines that he did not have to make any statement and he did not advise him as to his right to have an attorney or to have one appointed (Tr. 203).

Court: "When you were there you were trying to find out whether this

man, this defendant was the person who had shot at Phillips were you not?"

Zarcone: "I was trying to find out if he was the subject that Mr. Phillips had shot at" (Tr. 204).

"I spoke to the nurse (after he left the room) and asked her to keep bullet after it was taken from the patient's head" (Tr. 206).

In response to cross-examination by defendant's counsel as to whether he was in Hines' room to investigate a complaint by Hines, he stated: "No, I went primarily to see if this was the man--if this was the man Mr. Phillips had shot" (Tr. 213).

"The purpose of your investigation was to implicate Mr. Hines in this robbery," Answer: "That is correct," (Tr. 217).

The Court then ruled: "I think the * * * officer, Zarconia was making an investigation--so I will admit Zarconia's Testimony too." (Tr. 259).

3. The Statement Made To Officer George Stern

This officer testified that he was attached to the Criminal Investigation Unit (Tr. 219); that he had been assigned to serve the arrest warrent on Hines; and that he had arrived at the hospital at 5:00 p.m. on April 27.

Sterr stated that there was a delay at the hospital because Hines was being made ready for his release (Tr. 220).

Stern identified himself and advised Hines of the warrent and read to him from a card (P.I. 47) containing the cautionary language as to right to remain silent, access to counsel, etc. (Tr. 221 - 222). Hines made no statement at that time (Tr. 222).

The doctor at the hospital told Stern that Hines needed treatment and further medication and recommended that he be sent directly to D. C. General Hospital for further examination and care. Stern testified he directed the officer who was transporting Hines to have him booked and then sent to D. C. General Hospital (Tr. 223).

Stern testified that he "booked" Hines at #9; that he detained Hines no more than 45 minutes; that he asked him if he was at the location of the alleged robbery and he acknowledged that he was there but he knew nothing of the robbery (Tr. 224 - 225).

In response to cross-examination, Stern admitted that the only time he read the cautionary language from card P.D. 47 to Hines was at the hospital. He also stated that he had not questioned Hines at the hospital (Tr. 230). Stern did not ride to the precinct with Hines who was transported in a patrol wagon. "When I returned to #9 we waited for Hines" (Tr. 230).

"I proceeded to make the lineup sheet after informing Mr. Hines again of his right to call an attorney if he wanted one" (Tr. 231).

"The defendant was advised of his rights at the time of his arrest"--but there is nothing in Stern's testimony to indicate the defendant was advised of his rights prior to the interrogation at #9 (Tr. 235).

With reference to this session of questioning, Hines testified: That the police took him from the hospital to another building and placed him in a cell--kept him an hour and a half--no one talked to him--then they put him in an automobile and took him to another building where he talked

to Officer Stern (Tr. 338, 345 - 347).

In response to a question as to his recollection of any cautionary statements, he admitted that a "piece of paper" was read to him at the hospital; he could recall no statement made to him at the precinct--"my head was aching and I told them that" (Tr. 339 - 340).

With reference to the D. C. General Hospital incident, he stated: "If I did, I don't know--I didn't see any people in white clothes" (Tr. 354).

No proof from the D. C. General Hospital was offered to show when Hines was admitted, or if in fact he ever was admitted.

It is clear that Hines spent the night in jail and went to Court the next morning (Tr. 354).

The Court ruled with reference to the Stern testimony: "I think whatever he said he said voluntarily after receiving the requisite warning * * * I am making it beyond a reasonable doubt" (Tr. 663 - 664).

B. The Testimony Of Ruiz, Zargone And Stern Before The Jury

(1) Ruiz was permitted to testify that Hines told him that he was shot somewhere on Fourth or Fifth Street. That he was standing near a red stake-body truck with North Carolina tags on it when he was shot by an unknown person (Tr. 349).

Ruiz characterized Hines as being in great pain. "He was squirming on the treatment table and squinting his eyes and I was having difficulty in getting him to answer me. I asked what happened and like I said previously, he remained silent at first and wouldn't answer direct

questions. I had to keep continuing to ask him before I could get an answer" (Tr. 352).

It should be noted that Hines was admitted to the emergency room at 11:40 a.m. (Tr. 377) and Ruiz was questioning him at 12:20 (Tr. 347).

(2) Zarcone was permitted to testify that he arrived at the hospital at 5:10 a.m.; that he took the complaining witness, Phillips, into Hines' room for identification purposes; that Phillips said he (Hines) looked similar in size, but he couldn't swear this was the man he shot (Tr. 330 - 332).

During the course of his interrogation of Hines, Hines in response to repeated questioning stated he had been shot in the market off of North Capitol Street; that he had been looking at a red truck and a white man sat up and shot him. The truck had North Carolina tags (Tr. 333).

Zarcone readily agreed in cross-examination that his purpose in questioning Hines was to find out "if he was the man who had been shot by Phillips". He also agreed that he never advised Hines of his rights to remain silent or any of the other cautionary warnings required (Tr. 343). He also characterized Hines as having a serious injury and in pain (Tr. 333, 341 - 342).

(3) Stern was permitted to testify that Hines told him he had been shot while standing "by the truck" (Tr. 689).

Stern characterized Hines' condition as "either being dizzy or that his head ached" (Tr. 690). At the conclusion of his interrogation (which he stated took no more than 45 minutes), he turned Hines over to the wagon crew and sent him to D. C. General Hospital (Tr. 731).

C. The Government's Case

In addition to the testimony of the three officers outlined above, the evidence produced by the Government tended to show that Albert F. Puckett and Willie Phillips were sleeping in a truck parked at the Fifth Street Market in Washington when an attempt was made by three men to rob them. Puckett testified he was hit by a fist--no real hard object. He didn't know how many men had entered the truck and he never saw the person who hit him (Tr. 275 - 276).

Phillips testified he had a small 32 calibre gun and that he shot at the men. He couldn't identify the defendant and stated he had not seen the face of the man. In fact, he could not tell whether he had hit anyone (Tr. 284 - 294).

After the men left, Phillips jumped out of the truck and phoned the police. In about twelve minutes thereafter the police arrived (Tr. 291).

Detective Charles Carpenter testified he had spent two days at the hospital waiting for the doctors to release Hines. On the day of the release he was notified of Hines' imminent release by the hospital at 3:50 p.m. He turned over the warrent to Detective Stern (Tr. 317 - 319).

He also stated the reason for delay in releasing Hines was that the hospital wanted to make sure he would receive needed medical attention and that no complications would set in (Tr. 322).

Carpenter admitted that a "Metropolitan Police Department Statement of Facts" report which he had prepared for the Police Department noted that Hines was taken from the Washington Hospital Center to D. C. General

Hospital and then released to 9th precinct (Tr. 327 - 328).

Dr. William Olison testified he had performed the operation for the removal of bullet and fragments from Hines' left ear on April 21. He described the wound as a gunshot wound to the left ear. The bullet had entered behind the ear and lodged deep in the external ear canal. Bullet and bony fragments were located deep in the ear canal, adjacent to the ear drum. "There was injury to the mastoid bone" (Tr. 304 - 323).

Officer Alfred D. McDonald testified as to Hines' condition around midnight of April 19 to the effect that Hines was in pain, bleeding and incoherent (Tr. 481 - 493).

Special Agent Richard J. Pappleton, the ballistics expert from the Federal Bureau of Investigation, testified that he was unable to determine from his examination of the bullet fragments removed from Hines' head that the bullet fragments were fired from the Phillips' gun. Nor could he say all the fragments came from the same bullet (Tr. 632 - 641).

In effect, the Government could not identify Hines as the assailant or the victim by direct proof. It established Hines' presence at the scene of the alleged crime by statements placing himself there given to the three police officers.

ARGUMENT

1. The Appellant Contends That The District Court Erred In Permitting Officer Ruiz To Testify That Appellant Placed Himself At The Scene Of The Alleged Crime Because Appellant Was Not Warned Of His Right To Remain Silent; Moreover, Appellant Was In Such A Dazed Condition That He Was In No Position To Make Any Voluntary Judgment Or Statement.

(Appellant requests the Court to read the following pages of the Reporter's Transcript: Tr. 21 - 26, 29 - 41, 247 - 248, 259, 347, 349, 352, 377.)

The evidence discloses beyond any doubt that the interrogation took place while appellant was on the operating table, attended by doctors, moaning, incoherent and bleeding (Tr. 352).

A defendant in a criminal case is deprived of due process of law if his conviction is founded in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession. Rogers v. Richmond, 365 U.S. 534, 5 L.Ed.2d 760, 81 S.Ct. 735.

"Any questioning by police officers which in fact produces a confession which is not the product of a free intellect renders that confession inadmissible." Townsend v. Sain, 372 U.S. 293, 9 L.Ed.2d 770, 783, 83 S.Ct. 745 (1963).

With reference to the Ruiz statement, the Court, after hearing the testimony out of the presence of the jury, stated: "I think the testimony of officer Ruiz is admissable" (Tr. 259). Thereafter, when it was called to her attention that the possibility existed that she be required by this Court to make her finding "beyond a reasonable doubt" she did so specifically (Tr. 301A).

This case presents the question whether the trial judge has applied proscribed standards in the preliminary determination of voluntariness. And if that is so, cannot this Court review the evidence presented to the trial court to determine whether, in fact, the trial court properly found voluntariness. It is no safeguard of the defendant's constitutional rights, i.e., to permit a jury to decide the coercion issue after a preliminary finding of voluntariness by the trial court, (Jackson v. Denno, 378, U.S. 368, 12 L.Ed. 908, 84 S.Ct. 1774 (1964)) if in fact the trial court's preliminary finding is clearly erroneous.

This Court has in Clifton v. United States, 371 F.2d 354 (1966) likened the "determination of whether a confession is voluntary" to, "a ruling on its admissibility as evidence." Certainly a ruling on admissibility of evidence is subject to review. That being so, it is submitted that no basis exists in the evidence presented to find that the statement given to Ruiz was voluntary.

2. The Appellant Contends That The Statement Made To Officer Zarcone Was Made After Preliminary Investigation Had Been Concluded And Police Attention Was Focused On Hines As The Perpetrator Of The Crime. At That Point, It Is Submitted, Hines Was Entitled To Be Advised Of His Rights To Counsel And To Remain Silent. It Is Conceded That No Such Warning Was Given To Him.

(Appellant requests the Court to read the following pages of the Reporter's Transcript: Tr. 193, 195, 197 - 198, 200 - 206, 213, 217, 259, 330 - 333, 341 - 343.)

In response to questions from the Court, Zarcone stated he was trying to find out if Hines was "the subject that Mr. Phillips had shot at"

(Tr. 204). "I spoke to the nurse and asked her to keep the bullet after it was taken from the patient's head" (Tr. 206).

In answer to a question from appellant's counsel, Zarcone stated that the purpose of his investigation was to implicate Hines in the robbery (Tr. 217).

Once the focus of the police investigation was upon Hines, the police were bound to fully and adequately warn the accused as to his constitutional rights.

Escabedo v. State of Illinois, 378 U.S. 478, 491, 84 S.Ct. 1758, 12 L.Ed. 977 (1964).

Miranda v. State of Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

3. The Appellant Contends That The Statement Made To Officer Stern Was Inadmissable On Three Separate Grounds: It Was Inadmissable As The "Fruit Of A Poisonous Tree"; It Was Inadmissable Because It Was Made After Arrest And No Warning Given To Hines As To His Constitutional Rights; And It Was Inadmissable Because It Was Obtained During A Period of Unreasonable Delay In Violation Of Criminal Procedure Rule 5 and Mallory.

(Appellant requests the Court to read the following pages of the Reporter's Transcript: Tr. 219 - 225, 230 - 235, 338, 339 - 340, 345 - 347, 354, 663 - 664, 689 - 690, 731.)

(a) Officer Zarcone testified that Hines admitted he was shot while standing beside a red stake truck with North Carolina tags at the time and place of the attempted robbery. It was with this information in hand that Officer Stern proceeded to secure incriminating admissions from Hines.

This Court has said that a statement or confession made subsequent to

another confession or incriminating admission obtained in the absence of a required warning of constitutional rights may not be used as evidence, unless it is first established that the last statement or confession was not the exploitation of the original illegality and was obtained under circumstances sufficiently distinguishing to purge it of the original taint.

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963.

Copeland v. United States, 343 F.2d 287 (1965).

(b) Although Officer Stern testified that he had read the requisite warning to Hines at the hospital, he admitted he did not repeat the warning to Hines when he began his interrogation at the police precinct about one hour later (Tr. 231). Hines testified he was taken to a room in a police patrol and kept for one and one-half hours and then taken to another place where he was interrogated by Stern (Tr. 338, 345 - 347).

According to Stern, "I proceeded to make the lineup sheet after informing Mr. Hines again of his right to call an attorney if he wanted one" (Tr. 231). It is clear that Hines was not given the warning as to his right to appointive counsel as required when in custody. See: Miranda, supra, p. 444, 86 S.Ct. 1602 (1966).

It is true that Hines made response to certain questions which might indicate he received some warning at the police precinct, but this came after he stated that he could recall no statement made to him at the precinct but that "a piece of paper" was read to him at the hospital. It

would appear more likely that such answer was intended to refer to the piece of paper at the hospital and not at the precinct (Tr. 339 - 340). Moreover, the Government did not attempt to prove by Stern that he had given such warning at the precinct and Stern's only testimony on this point was as noted above: "I informed Mr. Hines again of his right to call an attorney if he wanted one" (Tr. 231).

(c) Rule 5(a) of the Federal Rules of Criminal Procedure requires that

"(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

Hines was arrested at 5:00 p.m. on April 27, 1967. Just what occurred thereafter is not clear. Hines testified that he was taken to a cell where he remained approximately one and a half hours and was then taken to another cell where he was taken "upstairs" for questioning (Tr. 337). Officer Stern stated Hines was taken directly to precinct #9 and questioned during a process of form-filling for some 45 minutes and then sent to D. C. General Hospital. He spent the night in jail and went to Court the next morning (Tr. 354). "The Metropolitan Police Department Statement of Facts", a report prepared by Officer Carpenter who was the officer originally

assigned to make the arrest, said that Hines was first taken to D. C. General Hospital and then released to the police department (Tr. 327).

The language used by this Court in Spriggs v. United States, 335 F.2d 283 (1964) is most applicable to this case:

"We do not agree that the admissions were 'threshold.' Just what occurred at the station, and its sequence, cannot be determined with accuracy. It is clear, however, that Spriggs was booked and then taken 'upstairs' for questioning during a process of form-filling, instead, as required, being taken 'as quickly as possible' to a magistrate after being booked. Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957).

"(1) The McNabb-Mallory exclusionary rule does not permit the use at trial of evidence of a repudiated confession obtained by secret interrogation during a form-filling process such as here occurred after arrest on probable cause and prior to arraignment. It is of little consequence that the officer says he advised Spriggs he need make no statement and if he did it would be used against him. Under the law Spriggs was entitled to be taken to a magistrate for public advice by the magistrate as to his rights, including his right to counsel with an opportunity to obtain counsel. In the varying circumstances affecting different persons, with differences in their experience, education and other individual attributes, it is impossible to measure accurately the pressures in a Police Station upon prisoners under secret interrogation without counsel, relative or friend. The unreliability of evidence of statements then said to have been made,

as well as the need to obtain compliance with Rule 5(a), note 5, supra, is one of the reasons the Supreme Court adopted the rule of evidence regarding confessions which no longer turns upon the issue of their voluntariness. The rule is found in the following language of the Supreme Court:

> 'The arrested person may, of course, be 'booked' by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed to eliciting damaging statements to support * * * his guilt.'

Mallory v. United States, supra 354 U.S. at 454, 77 S.Ct. at 1359. To enlarge the time consumed in the usual booking process by the filling out of a number of forms prior to taking the prisoner to a magistrate, and to contend that the time thus consumed is not 'unnecessary delay' and therefore available for secret interrogation to elicit a confession is to ask the court to erode the McNabb-Mallory rule. If these forms are to be filled out prior to the prisoner's appearance before a magistrate, which may well be, it does not follow that a self-incriminating statement elicited by police interrogation during the process is admissible. The inquiries of Officer Bailey in this case were designed, as appears from his own testimony, to elicit the 'damaging statements' referred to in Mallory, and such statements are not rendered admissible because elicited during the form-filling process. We bear in mind that Mallory is a reaffirmation and clarification of McNabb v. United States, 318 U.S. 332, 344, 63 S.Ct. 608, 614, 87 L.Ed. 819, where the Court in 1943 had said that the statutory predecessor of Rule 5(a) 'aims to avoid all the evil implications of secret interrogation of persons accused of crime.'"

" * * * * * There always remains the question whether the time was utilized to obtain a confession by secret police interrogation after arrest and prior to a magistrate's hearing. For a confession so obtained is not 'spontaneous' within the Mitchell decision, and it is not admissible under Mallory.

"The McNabb-Mallory rule, as it seems to me, takes into account not only the obtaining of compliance with Rule 5(a) of the Federal Rules of Criminal Procedure. As we have said it takes into account also the unreliability of evidence obtained by secret interrogation. We add that the rule is related also to the constitutional protection of the Fifth Amendment against compelled self-incrimination, and to the guaranty of the Sixth Amendment of the right to counsel and to a public trial, though the rule has not been explicitly based upon these constitutional provisions.

"As we pointed out in Killough v. United States, supra, the status of a person changes when he is arrested. The law attaches specific rights to this changed status, spelled out in Rule 5 of the Federal Rules of Criminal Procedure. The governmental machinery available to aid the investigation and prosecution of crime is to be used consistently with these rights. The result is to preclude the use at trial of self-incriminating statements said to have been made during secret police interrogation in the interval after arrest and prior to compliance with the rights granted--statements which are not 'spontaneous' as in Mitchell.

"It would be a disservice to the exclusionary rule reaffirmed in Mallory were we to hold that the means here used to enlarge the period of

delay between arrest and magisterial proceedings served to render admissible confessions said to have been elicited during that period. For us so to hold would sanction an erosion of an important rule of evidence. It was the erosion of McNabb that led the Supreme Court in Mallory to reaffirm McNabb."

CONCLUSION

For the reasons stated, appellant contends that the judgment of the District Court should be reversed.

Respectfully submitted,

Samuel Barker
Attorney for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant was delivered to the office of Frank Q. Nebeker, Esq., Assistant United States Attorney, this day of February 1969.

Samuel Barker

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,059

JERRY A. HINES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

GERALD H. COHEN,
Special Assistant
United States Attorney.

Cr. 1014-67

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ISSUES PRESENTED *

In the opinion of the appellee, the following issues are presented:

1. Whether hospital statements made by appellant to Officer Ruiz while in a strong condition, receiving no medication and feeling little pain can be viewed as anything other than voluntary?

2. Whether prior to appellant's statement Officer Zarcone was required to inform him of his constitutional rights in light of the fact that the appellant was not in custody or its equivalent and at that time the investigation was not focused upon him.

3. Whether there are any grounds for excluding the statement made to Officer Stearn in light of the admissibility of appellant's earlier statements, the complete warning given him of his constitutional rights, and the lack of any unnecessary delay prior to arraignment?

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* This case has not previously been before this court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,059

JERRY A. HINES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By the indictment filed August 14, 1967, appellant and two other persons were charged with assault with intent to commit robbery (22 D.C. Code 501) against one Albert F. Puckett on April 19, 1967. After a trial before United States District Judge Burnita Shelton Matthews sitting with a jury on January 30-February 6, 1968, appellant was found guilty as charged. On April 5, 1968, appellant was sentenced to a term of one to four years imprisonment. This appeal followed. The following transpired below.

Pre-trial Hearing Pursuant to appellant's motion the Court considered the admissibility of evidence in the form of statements made by appellant to Officers Ruiz, Zarcone, and Stearn.

Officer Ruiz testified that he went to the Washington Hospital Center Emergency Room at about 12:20 a.m. on April 20, 1967 in connection with a gunshot victim in the emergency room and that he had no knowledge at that time of the circumstances under which the shooting had occured. (Tr. 20-21). He had simply gone to the hospital in response to a call to police headquarters from Precinct 10, the precinct covering the hospital, indicating that a person had been admitted with a gunshot wound to the head. (Tr. 35-38.)

The officer entered the emergency room, and was allowed by the medical personnel attending appellant to question him (Tr. 22-23, 38-39.) Appellant appeared to the officer to have a bullet wound in the left ear which was bleeding and being probed by a doctor and he seemed to be feeling some pain (Tr. 23-24, 26-30, 39-40). Appellant did not show any signs of intoxication. (Tr. 33, 35).

Officer Ruiz identified himself as a police officer and asked appellant where and how he had received his injuries. (Tr. 24). In response appellant made reference to Maryland and Officer Ruiz thinking that the injury may have occurred in Maryland sought to have a unit of the Maryland police come to the Hospital Center. (Tr. 24.) Then upon further questioning appellant stated to Officer Ruiz that he had received his injuries near a red stake-body truck which was parked around 4th or 5th Street, Northeast and he indicated that he had been standing by the truck when a man began shooting at him. (Tr. 25-26, 40-41.)

The entire conversation between Officer Ruiz and appellant lasted between 15 and 20 minutes including the time spent trying to contact the Maryland police (Tr. 27.) Officer Ruiz used a normal tone of voice throughout the conversation (Tr. 27-28). The appellant, who at first

seemed incoherent spoke hesitantly and in short phrases. (Tr. 28, 30-31, 34, 40). However, his answers were responsive to the questions (Tr. 33, 35).

Next, Doctor Harry C. Stein, an attending physician at the hospital testified. At 12:10 a.m., immediately following appellant's admission to the hospital he was examined and found to be conscious and alert with normal pupils and reflexes which is the same as saying that he was awake and responsive (Tr. 76-77, 174.) The terms conscious and coherent mean that the patient is awake and able to respond in a logical manner to what is asked (Tr. 79). There was no entry in appellant's hospital record as to pain at the time of his admission and Dr. Stein in filling out such records would have taken note of any severe pain as opposed to just discomfort. (Tr. 76, 78.) Rather than being likely it was only possible that appellant was in fact in pain. (Tr. 174.) No anesthesia of any kind was administered to him in connection with the emergency room examination. (Tr. 189-190.)

An additional examination by the chief resident in surgery also found appellant to be alert and conscious even though he had an alcoholic odor on his breath. (Tr. 82-83, 175.)

The third diagnostic examination of appellant was by Dr. Stein himself at 7:30 a.m. on April 20, 1967 who found the patient conscious and coherent, although he was suffering from a bullet wound in the left ear which had affected the hearing in that ear. (Tr. 52-53, 172.)

Based on all of these concurring diagnoses, defining concussion as being manifested by a loss of consciousness, appellant did not show evidence of a concussion or any other neurological abnormalities in any of the various examinations of him (Tr. 82-87, 161, 189, 191).

Dr. Stein discussed the medication received by appellant during the night of April 20th. (Tr. 89-90.) At 2:30 a.m. he received medication to prevent the development of tetanus which is not known to have any affect on consciousness or alertness (Tr. 58-59, 75-76, 153-154, 180, 186, 189.) A pain reliever, Darvon, was also prescribed

to be given as needed but there is no indication that it was ever administered (Tr. 154, 173, 190.) In that connection the nurses attending to appellant did not receive instructions as to prescribed medication until 3:15 a.m. of that morning (Tr. 90), and the 3:00 a.m. entry in the nurses notes indicates that appellant was admitted to the floor suffering from no apparent distress (Tr. 157, 178).

On April 22nd, an operation was performed on appellant beginning at 11:30 a.m. which successfully removed the bullet by means of surgical incision locating it in the external canal of the left ear. (Tr. 168-169, 187). There was no evidence of injury to the middle ear or to the brain (Tr. 169, 187).

Then, Officer Zarcone testified as to his conversation with appellant at 5:15 a.m. on April 20, 1967 (Tr. 194). Knowing that there had been an attempted robbery at the Northeast Market in which one of the robbers had received a gunshot wound, he had gone to the hospital in response to a notification from the police dispatcher that there was a man at the Washington Hospital Center suffering from a gunshot wound (Tr. 200-201). Although Officer Zarcone had no idea that appellant was in fact the man being sought in connection with robbery, having already been given Mr. Phillip's name in a prior dispatch report concerning the robbery, he picked him up at the market and brought him to the hospital (Tr. 200-201).

When they arrived at the hospital, Officer Zarcone spoke to Officer Ruiz who stated that he had responded to the hospital to investigate the gunshot wound received by appellant (Tr. 193, 202, 204-205, 210).

Then Officer Zarcone took Mr. Phillips in appellant's room in order to see if he could identify appellant as the person shot in the course of the attempted robbery (Tr. 194-195, 204, 211, 212-213-214, 218). Without speaking at all to appellant, Officer Zarcone asked Mr. Phillips if he recognized him. (Tr. 195, 203, 211.) Mr. Phillips said that appellant fitted the general description but could not identify him as the man that had attempted to

rob him (Tr. 196-197, 212, 214, 216-218). Mr. Phillips left the room at that point leaving Officer Zarcone alone with appellant (Tr. 196-197, 202-203, 206).

Officer Zarcone testified that since Mr. Phillips had been unable to identify appellant as the person wounded by him, appellant was no longer a suspect in that matter and the subsequent questioning concerned the way in which he received his gunshot wound (Tr. 212-213, 214, 216, 217). After identifying himself Officer Zarcone asked appellant what had happened. (Tr. 197-198, 213.) Appellant replied that he was shot at the Northeast Market near North Capitol Street by a white man who sat up in a red truck, with North Carolina tags while he and two of his friends were looking at the truck. (Tr. 197-199, 214).

The entire conversation lasted only three or four minutes and both Officer Zarcone and appellant used a normal speaking voice (Tr. 199, 203.) Officer Zarcone did not make any threats or promises (Tr. 202).

After speaking to appellant Officer Zarcone did not arrest him and neither he nor any of the other officers sought to restrain appellant in any way. (Tr. 202, 206-207). Before he left the hospital, the officer did ask a nurse to put a stop on the bullet if it was extracted from the patient's head. (Tr. 206.) Then Mr. Phillips was taken back to the market (Tr. 206).

Later on at the precinct station, Officer Zarcone asked Detective Carpenter to continue the investigation and to arrest appellant if he thought it was warranted. (Tr. 207). At that time, Officer Zarcone advised Detective Carpenter that Mr. Phillips could not identify appellant as the subject who had attempted to rob him. (Tr. 207).

The next witness was Detective George Stearn. He went to the hospital at approximately 5:00 p.m. on April 27, 1967 with a warrant for the purpose of arresting appellant (Tr. 219-220). He had been advised that appellant was about to be released from the hospital (Tr. 220). When he arrived at the hospital there was a fur-

ther delay of 45 minutes or more in that appellant was being redied for his release (Tr. 220).

When appellant was ready, Detective Stearn approached him stated that he was a Metropolitan Police Officer and advised appellant that he had a warrant for his arrest (Tr. 221). Appellant was then advised of his rights by Detective Stearn who at that time read the required language on the PD 47 card. (Tr. 221-222, 230, 235, 241-242.)

> You are under arrest. Before we ask you any questions you must understand what it is. You have the right to remain silent. You are not required to say anything to us at any time or to answer any questions. Anything you say can be used against you in Court. You have a right to talk to a lawyer for advice before questioning. If you cannot afford a lawyer, a lawyer will be provided for you. If you want to answer questions now without a lawyer present you will still have the right to stop answering at any time. You also have a right to stop answering at any time until you talk with a lawyer.

At the time of his arrest appellant was also generally told of the charges against him (Tr. 221). Appellant was not asked any questions while at the hospital (Tr. 230). He did state at that time that he knew nothing about the robbery (Tr. 222).

Before leaving the hospital with appellant, Detective Stearn determined from the doctor on duty that appellant could use further treatment (Tr. 223). He therefore instructed the officer transporting appellant that after booking he was to be taken to D.C. General Hospital for further examination (Tr. 223).

Appellant was then transported to No. 9 precinct in a patrol wagon, a distance which in the rush hour traffic takes approximately 15 minutes to a half hour. (Tr. 222-223). Detective Stearn traveled separately in his police car. (Tr. 231).

Upon his arrival at the precinct, appellant was taken up to the detectives room on the second floor of the build-

ing for the purpose of booking him (Tr. 223-224, 230-231). This is a room used to prepare papers on those arrested, the papers consisting of a line-up sheet, personal history and facts in the case (Tr. 224, 231).

At the outset appellant was again warned of his rights and asked if he wanted to call an attorney (Tr. 224-225, 231, 233, 235). In response appellant again stated that he did not wish an attorney (Tr. 224).

Then, Detective Stearn questioned appellant in connection with the various papers involved in booking an arrested person. (Tr. 224-225, 227, 231, 233-234). Before any questioning, appellant was made aware of the contents of the warrant and accompanying affidavit which discussed with particularity the events of the particular attempted robbery in question (Tr. 339-340).

In response to Detective Stearns inquiry, appellant stated that he was standing with two other men by the truck at the location of the alleged robbery and was shot. However, he denied knowing anything about the robbery itself (Tr. 224-225, 236-237, 244, 245).

The booking process at the police station took no more than 45 minutes (Tr. 225). The actual questioning of appellant involved a period of less than five minutes (Tr. 227). Detective Stearn was with appellant during the entire time he was at the precinct (Tr. 226). After appellant was booked, he was turned over to the patrol wagon to be transported to D.C. General Hospital (Tr. 226-236).

The appellant took the stand to testify as to his mental and physical condition on the evening of the robbery and while at the hospital. After being shot he stood by his car and stated that although then dizzy and in pain he drove himself to the hospital, a trip which took about 15 minutes (Tr. 245-247). He testified that he did not remember anything which transpired during the subsequent four days (Tr. 247-249).

Detective Carpenter testified that appellant was arraigned in General Sessions Court on April 28, 1967. (Tr. 256.)

The Court then ruled that the testimony of Officer Ruiz and Zarcone as to the statements made to them by appellant were admissible beyond a reasonable doubt (Tr. 259, 301A). The Court reserved her ruling on the testimony of Detective Stearn (Tr. 259).

Trial before the jury.

The first witness was Mr. Albert F. Puckett. He and Mr. Phillips were sleeping in Mr. Phillips truck at the Northeast Market at shortly before midnight on the night of April 9, 1967. (Tr. 271-274.) He was awakened by being hit on the head and told that this was a holdup (Tr. 275-276, 278-279). He called Mr. Phillips who instructed him to lay back down. (Tr. 275-276, 279). Mr. Phillips then fired a shot, called the police who arrived shortly thereafter. (Tr. 275-277.)

Mr. Phillips testified as to the same events and brought out several additional facts. There were three assailants one of whom was striking Mr. Puckett. (Tr. 284.) He fired one shot and one of the men fell out of the truck, lay on the ground, got up groaning and walked across the street. He then got into a large light-colored car (Tr. 286-288). When the police arrived Mr. Phillips gave them the gun which was then identified by Mr. Phillips and introduced into evidence (Tr. 285, 286, 291). He then testified that his truck was the only occupied truck in the market that night (Tr. 292).

Detective Carpenter testified that he was assigned to the case in question on April 20, 1967 and obtained a warrant for the arrest of appellant on the same date (Tr. 317, 320). The actual arrest of appellant was postponed pending word from the hospital that they had finished treating him for his wound. (Tr. 320-322).

On April 26th, Detective Carpenter got the impression from one of the attending physicians that appellant could be now released from the hospital (Tr. 321). He waited at the hospital the entire afternoon and was then informed that appellant could not be released until the following day. (Tr. 318, 322).

He returned to the hospital early in the afternoon of April 27th and was not able at that time to get any word

as to appellant's release. (Tr. 318-319, 321, 323.) Then at 10 minutes to four in the afternoon he received a call from the nurse on duty informing him that appellant could now be released. (Tr. 318-319, 321, 324.)

Since Detective Carpenter's shift was almost over, he asked Detective Stearn to go to the hospital with the warrant and arrest appellant. (Tr. 319, 324-326.) This was at 4:00 p.m. (Tr. 325.) Detective Stearn went to the hospital and arrested appellant. (Tr. 319.)

Appellant himself testified that he was arrested at the hospital late in the afternoon of April 27th (Tr. 333-335.) He acknowledged that he was informed of his rights at the hospital (Tr. 339, 343.) Appellant then stated that he was taken to a room somewhere with bars and left there for a period of time when he thought might be as much as an hour and a half or as little as a half hour. (Tr. 337, 344-346, 348.) He noted that the door of the room was left open and he was alone. (Tr. 346, 348.)

He then said that he was taken by car to another building where he was spoken to by Detective Stearn in a second floor room. (Tr. 337-338, 348-349.) Appellant acknowledged that he was again informed of his right to an attorney, that if he could not afford a lawyer one would be provided, that he did not have to make a statement, that any statement could be used against him and that he had the right to stop talking at any time (Tr. 350-352, 356.)

Appellant testified that the only direct questions by Detective Stearn concerned his name and address (Tr. 338, 349-353, 358.) He denied making a full statement and indicated that he simply volunteered information concerning his whereabouts on the night of April 19th. (Tr. 349-352.) He stated that he was with Detective Carpenter a total of a half hour while the Detective was typing and after that spent an additional fifteen or twenty minutes in the same room. (Tr. 353.) He was not threatened, promised anything, tired, afraid or deprived of food.

Detective Stearn testified that appellant arrived at the precinct between five and ten after his arrival and certainly no more than twenty minutes later. (Tr. 363.) After appellant's arrival, it may have been as much as ten minutes before he was brought up to the Detectives room. (Tr. 364.)

Doctor William Ollison testified as to the operation he performed on appellant on the 22nd of April. (Tr. 303A, 319A-320A.) On the previous day, he had examined appellant (Tr. 319A-320A). Appellant at that time had few complaints except that his ear felt full, mildly painful and he could not hear very well from it. (Tr. 320A-321A.) Appellant was somewhat withdrawn in conversation but that could well have been caused by a reluctance to answer questions as opposed to pain (Tr. 327A-328A).

It was this physician's opinion that a superficial wound of this type which did not penetrate any vital organs or even the inside of the ear would cause very little pain in the hours immediately following the occurence of the injury. (Tr. 321A-322A.) During the period leading up to the operation the pain probably got slightly worse and could then be termed mild to moderate pain (Tr. 324A, 328A-329A).

When he performed the operation Doctor Ollison found the damage to be largely confined to the ear and the bullet fragments which entered to a depth of approximately one inch, did not go beyond the eardrum (Tr. 304A, 310A, 325A).

Officer Zarcone testified as to this visit to the hospital at 5:00 a.m. on April 20th in the same manner as he testified at the preliminary hearing prior to the impaneling of the jury. (Tr. 331A-345A).

Officer Ruiz also testified as to his visit to the hospital immediately following appellant's admittance in the same manner as he testified at the preliminary hearing except for several additional comments (Tr. 346A-387A). He stated that in the course of their conversation, appellant never indicated that he did not want to talk or that he wanted to stop talking (Tr. 354A).

After speaking to appellant he located a light-colored Cadillac convertible in the parking lot with D.C. registration plates 181-905 (Tr. 356A-358A).

Officer Duarte testified to investigating the attempted robbery in question shortly after midnight on April 20th (Tr. 393-394). He described the truck as a 1966 red Ford stake-body truck with a canvas top and with Carolina tags. (Tr. 398-399.) There was a sizable quantity of blood around the truck (Tr. 400.) Central Communications was not notified to be on the lookout at the hospitals for someone with a gunshot wound until 12:30 a.m. (Tr. 413-414).

Officer MacDonald testified concerning his conversation with appellant at around 12:10 a.m. on the morning of April 20th in response to a radio dispatch report, reporting a gunshot wound victim at the Washington Hospital Center. (Tr. 482-484.) He asked the permission of the nurse attending appellant in the emergency room before speaking to him and permission was given. (Tr. 485, 495.)

Officer MacDonald spoke to appellant but was unable to secure a response except for one reference to Maryland (Tr. 485-486, 491-493, 496-497.) The officer however acknowledged that he was speaking into appellant's injured left ear (Tr. 489, 498). The ear wound was bleeding only slightly and appellant was not grimacing or contorting his facial muscles. (Tr. 494). He was intermittently closing his eyes for short 15 to 30 second periods. (Tr. 487-488, 494, 496). Officer MacDonald was with appellant a total of 15 to 20 minutes and just before he left Detectives Ruiz and King arrived. (Tr. 486-487, 492.)

Doctor Harry Stein repeated the testimony he gave at the preliminary hearing but also made several additional comments relevant to appellant's condition and treatment received while at the hospital. (Tr. 503-563.) There is no record of appellant receiving any medication prior to 2:30 a.m. on the morning of April 20th (Tr. 541). The records also clearly show that he received no medication

between 3:00 a.m. and 6:00 a.m. of that morning (Tr. 562). Appellant did not complain to Doctor Stein of pain at 7:30 a.m. on the same morning (Tr. 527, 544.) The first indication in the records that Darvon was administered was on April 26th (Tr. 561.) Doctor Stein defined the terms, conscious and, alert, used to describe appellant's condition at the time of his admittance to the hospital, as meaning that the patient is able to respond to those questions directed towards him, however, simple or complex they may be (Tr. 559).

Mr. Francis Padgett, Chief Clerk of the Department of Motor Vehicles testified that their records revealed that a 1963 light-colored Cadillac convertible was registered to appellant as late as March 31, 1967. (Tr. 607-609, 615-617.) It was also revealed that the lienholder on this car was the American Security and Trust Company. (Tr. 620-621.)

Mr. Davenport, the Assistant Treasurer of the American Security and Trust Company, then testified that a payment was made on appellant's loan account on May 3, 1967 (Tr. 627-629).

F.B.I. Agent, Richard Poppleton, a firearms expert, was called upon to give relevant balistics information. (Tr. 632-636.) He was able to find that the revolver in question, the three cartidges and the fragments from the fired bullet were all of the same calibre and the fragments were from a bullet of the same make as the cartridges. (Tr. 637, 639, 641.) In addition, there was no evidence that these fragments originated from more than one bullet or from bullets of different composition. (Tr. 654.)

At this point the court ruled that the testimony of Detective Stearn as to statements made to him by the appellan was admissible beyond a reasonable doubt (Tr. 660-661, 664).

Detective Stearn was then called to the stand and repeated the same testimony he had given at the preliminary hearing. (Tr. 670-740.) In addition, he expressly noted that appellant never refused to answer questions or indicate that he wished the questioning to stop. Appellant

even volunteered information. (Tr. 694.) Detective Stearn firmly rejected the possibility that appellant could have been taken elsewhere for a period of any length such as an hour before being brought to the Detectives room. (Tr. 700.)

That concluded the testimony and after argument and instruction appellant was found guilty as charged. (Tr. 800.)

ARGUMENT

I. The statement by appellant to Officer Ruiz was voluntary and therefore the District Court was correct in admitting this testimony.

(Tr. 20-21, 22-24, 26, 27-30, 33-35, 35-38, 39-40, 52-53, 58-59, 75-78, 79, 82-87, 89-90, 153-154, 157, 161, 168-169, 172-175, 178, 304A, 310A, 319A, 321A, 324A, 325A, 327A-329A, 354A, 489, 498, 527, 541, 544, 559, 561)

The Supreme Court has in a series of decisions clearly delineated the standard by which a determination, can be made as to whether a particular statement was voluntarily given. *Blackburn* v. *Alabama*, 361 U.S. 499 (1959); *Reck* v. *Pate*, 367 U.S. 433 (1962); *Towsend* v. *Sain*, 372 U.S. 293 (1963). In *Blackburn* v. *Alabama supra*, at 208 it defined a voluntary statement as being "the product of a rational intelect and a free will," or conversely "whether the defendant's will was overborne at the time he confessed". *Reck* v. *Pate supra* at 440.

In *Jackson* v. *Denno*, 378 U.S. 392 (1964), the court went on to firmly reject the idea that hospital bed statements by wounded persons are inherently involuntary by noting that the statement was inadmissible only under the defendant's version of the facts. If a wounded person is in strong condition, his coherent responses to "brief questioning by the police unaffected by drugs or threats or coercive behavior" will be admitted into evidence.[1]

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[1] See Footnote 20 in *Jackson* v. *Denno, Supra.*

Clearly, the conduct of police the overall condition of the person being questioned, his ability to respond, and the extent to which drugs have been administered are crucial factors in determining whether or not his statements here voluntary.

It is in light of these relevant comments by the Supreme Court that the applicability to the present facts of this Court's position in *Pea* v. *United States*, —— U.S. App. D.C. ——, 397 F.2d 627 (1967), must be determined. There it was found that the defendant's physical condition was such that the statements made by him to the police were not the product of his free will.[2] Basic to that determination was undisputed medical testimony that the defendant's head-wound, which virtually destroyed his eye sight and produced a concussion, rendered him indifferent to protecting himself with respect to questions.[3] Very little weight, if any, was given to the testimony by the police officer who had talked to the defendant concerning his view of the defendant's physical condition at the time of their conversation.[4] The failure of the officer questioning the defendant to warn him of his right to remain silent was noted by the court as a factor in its decision.[5]

In the case now before the court, the factual elements are quite different. The medical testimony based on the observations of three different physicians at various points in the time during the night in question clearly show that appellant's condition was not at all comparable to the condition of the defendant in the *Pea* case.

Appellant was examined just a few minutes before Officer Ruiz spoke to him and found at that time to be in a condition which could interchangably be termed conscious and alert, awake and responsive or conscious and coherent (Tr. 76-77, 79, 174) Dr. Stein, the physician testifying at the pre-trial hearing defined these terms as meaning

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[2] See 392 F.2d 632-633.

[3] See 397 F.2d 633-634.

[4] See 397 F.2d 635.

[5] See 397 F.2d 636.

that the patient is awake and able to respond in a logical manner to what is asked. (Tr. 79.) Later before the jury, he developed that definition by saying that appellant's condition was such at the time of his admittance to the hospital so as to enable him to respond to those questions directed towards him, however, simple or complex they may be. (Tr. 559.)

Examinations on the same day by the chief resident in surgery and Dr. Stein, the medical witness at the trial, also resulted in descriptions of appellant's condition as alert, conscious and coherent (Tr. 52-53, 82-83, 172, 175). There is no firm medical evidence that appellant was in pain at the time Officer Ruiz spoke to him (Tr. 76, 78, 174). Dr. Ollison, the surgeon who operated on the appellant found his wound to be only mildly painful at the time of his examination on April 21st and expressed the opinion that the appellant's wound would produce very little pain in the hours immediately following the occurence of the injury. (Tr. 320A-322A.) He had received no medication at all at the time of his conversation with Officer Ruiz (Tr. 89-90, 541).

The appellant's wound was a superficial one which did not penetrate the brain or the inside of the ear and which had in fact lodged in the external canal of the ear (Tr. 168-169, 187, 321A-322A). Doctor Ollison noted that the bullet fragments which had penetrated to a depth of approximately one inch did not go beyond the eardrum (Tr. 304A, 310A, 354A.) Unlike the wound in *Pea*, here it is absolutely clear that there was no sign of a concussion or any other neurological abnormalities. (Tr. 82-87, 161, 187-189, 191.)

Whereas in *Pea*, the diagnostic testimony given by the officer described the defendant's condition in highly favorable terms,[6] here both officers who had spoken to appel-

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[6] Throughout the conversation the defendant appeared to Coppage as being coherent and he had no trouble talking. Detective Coppage smelled no alcohol on the breath of the defendant, he did not show any evidence of pain; and at no time did defendant state that he did not want to talk. Defendant's speech at all times was normal

lant at a little after midnight on the night of April 20th expressed the view he had difficulty talking and appeared to be in pain. (Tr. 28, 30-31, 34, 40, 485-488, 491-493, 494, 406-497.) But the Government submits that little weight should be given to the testimony of officer's MacDonald and Ruiz concerning the physical condition of appellant at the time of their conversations with him in light of the position taken by the court in *Pea.* There the view was that the medical testimony and hospital record of the Defendants condition at a point in time subsequent to the conversation in question was determinative in spite of the officer's contrary testimony as to the defendant's condition at the time of the conversation.[7] Here too, the substantial and completely consistant medical testimony should be the evidence considered by the court in arriving at its view of appellant's physical condition.

Even though the overwhelming weight of the medical evidence establishes that appellant was in strong condition able to respond to questions and had no medication at the time of his conversation with Officer Ruiz, there does remain for consideration another relevant factor referred to by the Supreme Court in *Jackson* v. *Denno,* the conduct of the officer. The conversation was short, lasting less than fifteen or twenty minutes and Officer Ruiz used a normal tone of voice throughout. (Tr. 27-28.) Appellant never indicated that he did not want to talk or that he wanted to stop talking (Tr. 354A). Officer Ruiz had absolutely no knowledge of the crime in question at the time he spoke to appellant and therefore could have only been

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and no medication was administered to defendant during the five minute conversation. At no time during the conversation did Detective Coppage notice anything out of the ordinary in appellant's breathing.

[7] It is also significant that at 397 F.2d 634, the court noted: "the District Judge reviewed the physical attributes of appellant's condition making references favorable to the prosecution. He referred to but did not focus on the significance of Dr. Mena's testimony concerning defendant's indifference to protecting himself, *testimony that stands uncontradicted on the record*". (Emphasis added).

interested in ascertaining the cause of the inquiry rather than attempting to connect him with any crime. (Tr. 20-21, 35-38, 413-414) Whereas in *Pea*, Detective Coppage had already been to the scene of the crime and the defendant in that case, although wounded himself, immediately became the prime suspect, in the murder for which he was later convicted.[8] Although Detective Coppage may not have known the particular circumstances surrounding the double shooting at the time of his visit to the hospital,[9] the Defendant was in fact already under arrest. *Pea* v. *United States*, 116 U.S. App. D.C. 410, 324 F.2d 442 (1962).

Considering that Officer Ruiz was solely attempting to ascertain the cause of appellant's injuries and in no way connected him with any crime, there was absolutely no reason to warn appellant of his constitutional rights (Tr. 24). As has already been noted, the defendant *Pea* was then under arrest and consequently the admonition of the Supreme Court in *Davis* v. *North Carolina*, 384 U.S. 737, 740 (1964) concerning the requisite warning was properly applicable. However, there is nothing in the Supreme Court's language in the *Davis* decision to suggest that they envisioned this admonition being applied to a conversation with a wounded man not suspected to the slightest degree of any crime.[10]

Therefore, the Government submits that short of viewing all statements made by ill or wounded persons as inherently involuntary, there is little if any basis for a finding that appellant's statement to Officer Ruiz was involuntarily made. Accordingly, this Court should uphold the admitting of Officer Ruiz's testimony into evidence.

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[8] See 397 F.2d 628-629.

[9] See 397 F.2d 629, 631.

[10] That case involved a suspect who was held incommunicate and interrogated for 16 days.

II. It was not necessary for Officer Zarcone to advise appellant of his rights prior to questioning him due to the fact that at that time the investigation of the crime, for which he was later charged, had not focused upon him and he was not in custody or otherwise deprived of his freedom in any significant way.

(Tr. 193-197, 197-199, 200-201, 202, 203-205, 206-207, 210-214, 216-218, 221, 245-247)

As long as a police investigation is a general inquiry into an unsolved crime not focusing upon a particular suspect either in custody or deprived of his freedom in a significant way, it is not necessary to inform him of his constitutional rights prior to his making a statement. *Escabedo* v. *State of Illinois*, 378 U.S. 478, 490-492 (1964); *Miranda* v. *State of Arizona*, 384 U.S. 436, 444-445, 447-478, (1966).

The evidence introduced at the trial undisputably shows that at the time of Officer Zarcone's conversation with appellant he was not in custody nor deprived of his freedom in any way. By his own testimony, appellant indicated that he drove himself to the hospital and obtained admittance (Tr. 245-247). Thereafter, he was simply a patient at the hospital and unlike Pea who was under arrest while at the hospital appellant had complete freedom of movement consistent with his physical condition. His arrest did not take place until a full week later, the 27th of April. (Tr. 221.) It remained at the conclusion of Officer Zarcone's conversation with appellant only a possibility to be investigated (Tr. 207).

The court has recently considered the scope of custodial investigation and it is clear that even if there is limited and brief restraint in the course of the questioning, it is not necessary to warn the person of his constitutional rights. *Allen* v. *United States*, —— U.S. App. D.C. ——, 390 F.2d 476, 478-479 (1968) cf. *United States* v. *Gibson*, 392 F.2d 373, 376 (C.A. 4, 1968).

It is also clear that the investigation was not focused on appellant at the time Officer Zarcone undertook to question him.

Although the officer knew prior to the questioning that appellant had been shot under circumstances suggestive of the incident already related to the police by Mr. Phillips. Mr. Phillips was unable to identify appellant as the man he shot. (Tr. 194-197, 203-204, 211-214, 216-218). For that reason appellant was no longer suspected of this crime and the officer then inquired of the appellant purely as to the circumstances under which he received his gunshot wound. (Tr. 212-214, 216-217). Appellant responded by stating that he was shot at the Northeast Market near North Capitol Street, by a white man who sat up in a red truck with North Carolina tags while he and two of his friends were looking at the truck (Tr. 197-199, 214). Apart from the necessary element of custodial restraint or his equivalent, the investigation had clearly not focused on appellant in the *Miranda* sense at the time Officer Zarcone undertook to question him. The mere fact that he had already placed himself in the area in which the crime was committed in his conversation with Officer Ruiz is fully counter balanced by the inability of Mr. Phillips to identify him as the assailant. In the *Allen* case a person was questioned while the injured man was pointing his finger at him and the court stated that this gesture was too ambiguous in its meaning to lead to the conclusion that the police had because of that act focused its investigation on the man being questioned.[11] Likewise appellant's statement which placed him in the area in which the crime was committed and at the same time denied any criminal act is susceptible to too much varied speculation to lead to the conclusion that the investigation was thereafter focused upon appellant.

Unlike *Pea*, here there was no arrest or restraint in any form of appellant following Officer Zarcone's conversation with him (Tr. 202, 206-207). The investigation was being continued and arrangements were made to secure the bullet when it was removed from appellant's head (Tr. 206-207).

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[11] See 390 F.2d 479.

Consequently it was clearly not necessary for Officer Zarcone to inform appellant of his constitutional rights prior to speaking with him.

III. The statement made by appellant to Officer Stearn was not inadmissible on the grounds of being either the fruit of a poisonous tree made without sufficient warning of constitutional rights or as the result of questioning during a period of undue delay prior to arraignment.

(Tr. 220-223, 224, 230-233, 235-237, 241-242, 244-245, 256, 310-319, 320-324, 327, 333-335, 337, 344-346, 348-349-352, 356, 363-364, 680, 690)

Since the Government has unequivocally shown that the statements given by appellant to Officer Ruiz and Zarcone were properly admitted into evidence, there is in fact no primary illegality to affect the admissibility of subsequent statements. *Copeland* v. *United States*, 120 U.S. App. D.C. 5, 343 F.2d 287 (1964).

> The dissenting opinion is of the view that we need not inquire into the existence of any "primary illegality", since we find the apology independent of any illegality. This seems to us to put the cart before the horse. Before we look for fruit we must find a poisonous tree . . . our view that we must look for a primary illegality before considering whether such an illegality has been exploited within the meaning of *wrong* such seems to us the sound approach and is not rendered dictum by a dissenting view that we should attack the problem from another angle. (Page 292).

As to the sufficiency of the warning of his rights given to the appellant, the Supreme Court in *Miranda* referred to FBI procedures in order to show that any arrested person is to be warned of his constitutional rights "as soon as practicable after the arrest" and prior to the interview.[12] In *Jackson* v. *United States*, 118 U.S. App. D.C.

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[12] See 384 U.S. 485.

100, 104-105, 337 F.2d 136, 138-139 (1964), a decision favorably noted by the Supreme Court in *Miranda* this court found that the defendant there had been fully advised of rights on the basis of a complete warning at the time of arrest coupled with a reminder of the right to remain silent at the time of questioning. In that case it was found that the defendant had waived both his right to counsel and right to remain silent.

There is no question from the testimony given by both Detective Stearn and appellant that he was fully advised of his rights at the time of his arrest. (Tr. 221-222, 230, 235, 241-242, 339-343). He was not asked any questions at the hospital and he stated voluntarily that he knew nothing of the robbery. (Tr. 222, 230).

Immediately prior to being questioned at the precinct station, the appellant was again informed of his rights. (Tr. 224-225, 231-233, 235). This second warning was fully acknowledged by appellant in his testimony and he indicated that he was specifically informed of his right to an attorney which would be provided for him if he could not afford one, that any statement could be used against him and that he had a right to stop talking at any time. (Tr. 350-352, 356). Appellant at that time expressly stated that he did not wish an attorney (Tr. 224).

When he was booked, appellant indicated that he was present at the scene of the crime but denied that he had committed any criminal acts. (Tr. 224-225, 236-237, 244-245, 349-352). Appellant never refused to answer questions or indicate that the questioning should stop and he even volunteered information. (Tr. 694).

Taking an objective view of the testimony below there is plainly no grounds for the assertion that appellant was not fully informed of his constitutional rights prior to making a statement to Detective Stearn.

The "unnecessary delay" requirement does not proscribe all instances of time elapsing between arrest and the making of an incriminating statement. And it is always necessary to consider in each instance the sum total of circumstances. *Mallory* v. *United States*, 354 U.S. 449,

454-455 (1956), *Muschette* v. *United States*, 116 U.S. App. D.C. 239, 241, 322 F.2d 989, 991 (1963), *United States* v. *Quarles*, —— U.S. App. D.C. ——, 387 F.2d 551, 555 (1967) *cert. denied*, 391 U.S. 922 (1968). Any detention prior to arraignment which took place subsequent to the making of a statement cannot have the retroactive effect of receiving a statement already made inadmissible. *United States* v. *Mitchell*, 322 U.S. 65, 70-71 (1944), *Metoyer* v. *United States*, 102 U.S. App. D.C. 62, 64-65, 250 F.2d 30, 33 (1957). *Perry* v. *United States*, 102 U.S. App. D.C. 315, 316, 253 F.2d 337, 338 (1957), *cert. denied*, 356 U.S. 941 (1958); *Bailey* v. *United States*, 110 U.S. App. D.C. 241, 243-245, 328 F.2d 542, 544-545 (1964).

The warrant for appellant's arrest was secured by Detective Carpenter on April 20th but the actual arrest was delayed seven days due to appellant being hospitalized (Tr. 317, 320-322). On the 26th of April, Detective Carpenter got the impression from one of the physicians at the hospital that appellant was ready to be released and waited at the hospital the entire afternoon only to be informed that the release could not take place until the following day. (Tr. 318, 321-322). He returned early the next afternoon and was not able to get any information as to appellant's release (Tr. 318-319, 321, 323). Then at 10 minutes to four in the afternoon, he received a call from the nurse on duty informing him that appellant could now be released (Tr. 318-319, 321, 324). Since Detective Carpenter's shift was almost over, Detective Stearn was asked at 4:00 p.m. to go over to the hospital with the warrant and arrest appellant (Tr. 324, 326). Detective Stearn arrived at the hospital at 5:00 p.m. and there was a delay of about 45 minutes while appellant was being readied for his release. (Tr. 220, 680). Then he was arrested (Tr. 221, 333-335.)

This chronology of events clearly shows that the police were prepared to arrest appellant as much as a week earlier and were at the hospital early in the afternoon of both the 26th and 27th of April. It was purely the cir-

cumstances surrounding appellant's release from the hospital that resulted in his being arrested late in the afternoon, therefore, there is absolutely no basis for the assertion in the appellant's brief that the arrest was made late in the day so as to be able to hold appellant overnight prior to arraignment.

Before leaving the hospital with the appellant Detective Stearn determined from the physician on duty that appellant could use further treatment (Tr. 223). He therefore instructed the officer transporting appellant that after booking he was to be taken to D.C. General Hospital for further examination. (Tr. 223). Detective Stearn then travelled separately to the precinct in his patrol car, a trip which takes from 15 minutes to a half hour in rush hour traffic. (Tr. 222-223, 230-231.)

After arriving at the precinct Detective Stearn waited for appellant to arrive a period of five to ten or even as much as twenty minutes and it may have been an additional ten minutes before he was brought up to the detective's room (Tr. 3636-364). Appellant asserts that during this period prior to his being taken to the detective's room, he was left alone in another room in another building for uncertain period of time which could have been only a half hour. (Tr. 337-344, 346, 348). Detective Carpenter testified that the appellant might have been taken briefly to D.C. General Hospital before proceeding on to the precinct station (Tr. 327).

There is admittedly in the testimony introduced at the trial uncertainty, concerning this short period of time. However, the appellant's own testimony confirmed that nothing occurred during this interval of substantive significance in terms of unnecessary delay in arraignment particularly since it was already evening by this time and appellant could not be arraigned until morning.[13]

The booking of the appellant took about 45 minutes, both Detective Stearn and the appellant concurring in the

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[13] The Government has already shown that the timing of the arrest was completely determined by the hospital's decision concerning the appellant's release.

amount of time involved. (Tr. 225, 353.) Then he was taken for the night to D.C. General Hospital and arraigned the following morning (Tr. 226, 236, 256).

This court in the *Muschette* case set forth a standard by which it could be determined whether the *Mallory* rule regarding arraignment had been complied with.

> Evaluations of situations such as this should be realistic. The extraction of a confession by whatever means is outlawed and its products are not admissible in a court of law. But the "Mallory Rule" is not a carpenter's measuring stick to be used by merely lying it alongside the material to be a mechanical rule that in all instances the mere passage of a given length of time would require the rejection of a confession. The problem is not solved by watching the clock; the solution is to be reached by determining whether the delay which occurred was in fact unnecessary when the sum total of the circumstances shown is considered (Page 991).

Keeping in mind that the relevant period of time is that which elapsed prior to appellant's statement the Government submits that its brevity and innocuous content as regards the conduct of the police preclude the finding of unnecessary delay. This court should therefore, reject appellant's contention that there was unnecessary delay in the arraignment violation of Rule 5 (a) of the Federal Rules of Criminal Procedure.[14]

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[14] Even if the court should find that there was delay prior to appellant's giving a statement to Officer Stearn the Government submits that the sufficiency of the evidence underlying the conviction is not affected since this statement by appellant was merely a duplication of his two prior statements to Officer Ruiz and Zarcone.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

GERALD H. COHEN,
Special Assistant
United States Attorney.

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